

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

**IN RE OPTICAL DISK DRIVE
ANTITRUST LITIGATION**

CASE NO. 3:10-md-2143 RS

**ORDER DENYING MOTIONS FOR
CLASS CERTIFICATION**

This Document Relates to:

ALL ACTIONS

I. INTRODUCTION

This Multi-District Litigation alleges a conspiracy among defendants to fix the prices of optical disc drives between 2004 and 2009. Two groups of plaintiffs, “direct purchasers” and “indirect purchasers,” who are separately represented and proceeding under separate complaints, seek class certification. The central dispute in both certification motions is whether plaintiffs’ experts have presented a viable methodology for establishing class-wide antitrust injury and damages. Because neither group of plaintiffs has made a persuasive showing that the expert analyses they proffer sufficiently address the relevant question, the motions must be denied.

II. BACKGROUND

An optical disc¹ is a medium for storing data. Familiar forms include CDs (compact discs) typically containing music or computer software, and DVDs (digital video disc or, officially, Digital Versatile Disc), often containing movies or other video content, and also used for computer software. When first introduced to the public, optical discs only contained files that were recorded onto them during the manufacturing process—they could be “read” but not written to, much like phonograph records of an earlier time (“read only discs”). As the technology advanced, optical discs were developed that allowed an end user to record data on a one-time basis (“recordable discs”). Eventually optical discs appeared on the market that permitted data to be recorded and re-recorded indefinitely (“rewritable discs”), which are analogous to magnetic tape, or hard and floppy computer disks. In a broad sense, the technology evolved generationally from CDs to DVDs to Blu-Ray Discs, each with the same progression moving from read-only, to recordable, and then to rewritable.

Optical disc drives—ODDs—are devices that allow data to be read from and, where applicable, written to, optical discs. ODDs are typically “backwards-compatible,” – that is, an ODD that is designed to read (and perhaps write to) a more recently-developed format of optical disc usually will also be able to process older formats as well. ODDs have applications in a variety of consumer electronic devices, including desktop and laptop computers, game consoles, and camcorders. In these applications, the ODD is typically a built-in component of the device. ODDs are also available as stand-alone units, in a number of forms. Where ODDs are incorporated into other products such as computers, they typically represent a relatively small percentage of the cost of the product as a whole.

During the putative class period, the prices of ODDs were generally marked by steep declines. While each generational advance in the technology was often introduced at a higher price, the overall trend was downward, and dramatically so, as has generally been the case in the high technology arena. Plaintiffs’ basic theory in this action is that defendants were highly motivated to attempt to slow, or at least stabilize, the inevitable decline in prices. Plaintiffs are not arguing that

¹ Although the caption of this action is “In re Optical Disk Drive Litigation,” the preferred spelling appears to be “disc,” for optical media, as opposed to “disk,” for magnetic media.

1 the alleged conspiracy drove prices upward, merely that it kept prices from falling as rapidly and/or
2 as far as they otherwise would have.

3 At the center of this action are multiple instances of alleged “bid rigging” involving
4 procurements of ODDs by Dell, HP, and Microsoft. In connection with a now-closed Department
5 of Justice investigation into that conduct, defendant Hitachi-LG Data Storage, Inc. (“HLDS”)
6 pleaded guilty to criminal antitrust violations and paid a \$21.1 million criminal fine. Plaintiffs
7 contend, in essence, that the bid rigging was merely one part of a vast industry-wide price-fixing
8 conspiracy, also involving inter-competitor agreements, and exchanges on price, output, and other
9 types of confidential information.

10 The parties have engaged in lengthy and voluminous discovery. Plaintiffs contend that the
11 documentary evidence includes references to competitors “co-working” (i.e., colluding) on various
12 procurement events, and to express agreements on pricing or bidding for market share. Although
13 much of the evidence to which plaintiffs point involves the bidding events, they contend continuous
14 illegal information exchanges occurred among all defendants relating to customer accounts other
15 than HP and Dell. Plaintiffs point to certain “alliances” among defendants that allegedly allocated
16 customers and markets. They contend “supply arrangements” existed among certain defendants that
17 nominally were competitors in the market. Plaintiffs aver that defendants reached oral agreements at
18 various meetings in Asia and in the United States at various points in time.

19 Plaintiffs argue that cumulatively the evidence is indicative of a “pervasive” industry-wide
20 conspiracy. At least at this juncture, however, plaintiffs have not proffered evidence or allegations
21 that there were one or more instances in which the defendants’ executive decision-makers entered
22 into express agreements to fix prices across the board on an ongoing basis.

23 Both the direct purchaser plaintiffs (“DPPs”) and the indirect purchaser plaintiffs (“IPPs”)
24 now move for class certification. Defendants oppose, and also seek to strike the expert reports
25 offered by the plaintiffs.
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III. LEGAL STANDARD

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure, which represents much more than a mere pleading standard. To obtain class certification, plaintiffs bear the burden of showing that they have met each of the four requirements of Rule 23(a) and at least one subsection of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, amended by 273 F.3d 1266 (9th Cir. 2001). “A party seeking class certification must affirmatively demonstrate ... compliance with the Rule.” *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011). Rule 23(a) provides that a district court may certify a class only if: “(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). That is, the class must satisfy the requirements of numerosity, commonality, typicality, and adequacy of representation to maintain a class action. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir.2012).

If all four prerequisites of Rule 23(a) are satisfied, a court must also find that plaintiffs “satisfy through evidentiary proof” at least one of the three subsections of Rule 23(b). *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013). Relevant here is Rule 23(b)(3), which permits certification if a court finds that “questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3).

“[A] court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap with the merits of the plaintiff’s underlying claim.’ ” *Amgen Inc. v. Conn. Ret. Plans and Trust Funds*, 133 S.Ct. 1184, 1194 (2013) (quoting *Dukes*, 131 S.Ct. at 2551); see also *Mazza*, 666 F.3d at 588 (“‘Before certifying a class, the trial court must conduct a ‘rigorous analysis’ to determine whether the party seeking certification has met the prerequisites of Rule 23.’ ” (quoting *Zinser*, 253 F.3d at 1186)). This “rigorous” analysis applies to both Rule 23(a) and Rule 23(b). See *Comcast*, 133 S.Ct. at 1432 (discussing how Congress included “addition[al] . . . procedural safeguards for (b)(3) class members beyond those provided for (b)(1) or (b)(2) class members (e.g., an opportunity

1 to opt out)” and how a court has a “duty to take a ‘close look’ at whether common questions
2 predominate over individual ones.”).

3 Nevertheless, “Rule 23 grants courts no license to engage in free-ranging merits inquiries at
4 the certification stage.” *Amgen*, 133 S.Ct. at 1194–95. “Merits questions may be considered to the
5 extent—but only to the extent—that they are relevant to determining whether the Rule 23
6 prerequisites for class certification are satisfied.” *Id.* at 1195. If a court concludes that the moving
7 party has met its burden of proof, then the court has broad discretion to certify the class. *Zinser*, 253
8 F.3d at 1186.

10 IV. DISCUSSION

11 A. DPPs

12 DPPs seek certification of a class consisting of:

13
14 All individuals and entities who, during the period from January 1, 2004 until
15 January 1, 2010 (“the Class Period”), purchased one or more Optical Disk Drives in
16 the United States directly from the Defendants, their subsidiaries, or their affiliates.
17 Excluded from the class are Defendants and their parents, subsidiaries, affiliates,
named co-conspirators and all governmental entities.

18 “Optical Disk Drives” are defined to include, (a) a drive sold by a defendant or its subsidiary or
19 affiliate as a separate unit that is to be inserted into, or incorporated in, an electronic device; (b) a
20 drive sold by a defendant or its subsidiary or affiliate as a separate unit that is to be attached to an
21 electronic device through an external interface such as a Universal Serial Bus connection; and (c) an
22 internal drive sold as a component of a laptop or desktop computer by a defendant or its subsidiary
23 or affiliate. Thus, the proposed class consists of those who purchased ODDs, either as standalone
24 products or as products that were incorporated into desktop or notebook computers, directly from a
25 defendant, or its subsidiary or affiliate, but not those who purchased ODDs from entities other than
26 the alleged conspirators.²

27
28 ² The class and product definitions in the current complaints of both the DPPs and the IPPs have
been revised from those at issue during the motions to dismiss, which raised certain issues, as
discussed in the prior orders. Defendants have not renewed similar challenges to the present

1 1. Rule 23(a)

2 a. Numerosity

3 Rule 23(a)(1) requires that a class be so numerous that joinder of all members is
4 impracticable. To satisfy this requirement, plaintiffs need not state the “exact” number of potential
5 class members, nor is there a specific minimum number that is required. See *In re Rubber Chem.*
6 *Antitrust Litig.*, 232 F.R.D. 346, 350–51 (N.D.Cal.2005); *In re Bulk [Extruded] Graphite Prod.*
7 *Antitrust Litig.*, 2006 WL 891362, *5 (D.N.J.2006). Here, there is no dispute that the number of
8 direct purchasers of ODDs in the class period exceeds one thousand and plainly satisfies the
9 numerosity requirement.³

10
11 b. Commonality

12 Rule 23(a)(2) requires that there exist “questions of law or fact common to the class.” Where
13 an antitrust conspiracy has been alleged, courts have frequently held that “the very nature of a
14 conspiracy antitrust action compels a finding that common questions of law and fact exist.” See *In*
15 *re Rubber Chem. Antitrust Litig.*, 232 F.R.D. at 351; *In re Bulk [Extruded] Graphite Prod. Antitrust*
16 *Litig.*, 2006 WL 891362 at *5. Here, at a minimum, the existence, scope, and efficacy of the
17 conspiracy to fix or stabilize prices of ODDs sold in the United States are all common questions that
18 DPPs must address.

19 Defendants strenuously challenge whether such common questions *predominate*, and/or
20 whether they can be answered through *common proof*, such that the requirements of Rule 23(b)(3)
21 can be satisfied. While those points arguably implicate whether there is commonality in the first
22 instance, they are more appropriately addressed under subdivision (b). For purposes of this motion,

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24
25 definitions. Although the two groups of plaintiffs define ODDs slightly differently, those
26 distinctions are not material to the questions presented in these motions.

26 ³ While not expressly stated in the rule, there is also a requirement of “ascertainability”—i.e., that
27 the members of the class be sufficiently definable and identifiable. See *In re High-Tech Employee*
28 *Antitrust Litig.*, 289 F.R.D. 555, 563 (N.D. Cal. 2013). There is no real dispute that requirement is
satisfied here as well.

1 it will be presumed that the DPPs have shown sufficient commonality exists to satisfy subdivision
2 (a).

3
4 c. Typicality and adequacy

5 Rule 23(a)(3) also requires that the claims of the named plaintiffs be typical of those of the
6 class. “Typical” does not mean “identical to.” Rather, typicality results if the representative
7 plaintiffs’ claims “arise[] from the same event, practice or course of conduct that gives rise to the
8 claims of the absent class members and if their claims are based on the same legal or remedial
9 theory.” *In re Auction Houses Antitrust Litig.*, 193 F.R.D. 162, 164 (S.D.N.Y. 2000).

10 In evaluating typicality, the court should consider whether the named plaintiffs’ “individual
11 circumstances are markedly different or . . . the legal theory upon which the claims are based differs
12 from that upon which the claims of other class members will perforce be based.” *See In re Bulk*
13 *[Extruded] Graphite Prod. Antitrust Litig.*, 2006 WL 891362 at *5. In cases involving an alleged
14 price-fixing conspiracy, the representative plaintiff’s claim is often considered typical even where
15 the plaintiff followed different purchasing procedures, purchased in different quantities or at
16 different prices, or purchased a different mix of products than did the members of the class. *See,*
17 *e.g., In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 479 (W.D.Pa.1999); *In re Indus. Diamonds*
18 *Antitrust Litig.*, 167 F.R.D. 374 (S.D.N.Y.1996).

19 Addressing a closely-related issue, Rule 23(a)(4) requires that the representative parties
20 fairly and adequately protect the interests of the class. This “adequacy” requirement mandates that
21 no conflicts of interest exist between the named plaintiffs and the absent class members. *See, e.g., In*
22 *re Rubber Chem. Antitrust Litig.*, 232 F.R.D. at 351, citing *Local Joint Exec. Bd. of*
23 *Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001).⁴

24
25 ⁴ The adequacy requirement also contains an element relating to the competence and diligence of
26 class counsel in pursuing the claims. *See id.*; *see also In re Linerboard Antitrust Litig.*, 203 F.R.D.
27 197, 207 (E.D. Pa. 2001). There is no concern in this instance with the adequacy of class counsel
28 separate and apart from the representativeness of the named plaintiffs. *Accord, In re Graphics*
Processing Units Antitrust Litig., 253 F.R.D. 478, 490 (N.D. Cal. 2008) (“It does not suffice that
counsel have an incentive to prove the wholesalers’ claims. While counsel in this case are excellent,
the test is whether the clients themselves, who ultimately control and drive the litigation, have the
requisite typicality under Rule 23.”)

1 In opposition to the DPPs' motion for class certification, defendants raise substantial
2 concerns about the typicality and adequacy of these named plaintiffs. The DPPs' reply briefing
3 included no direct response to those arguments. As discussed below, the dispositive issue in this
4 motion is the DPPs' inability to show a viable method for proving injury on a class-wide basis.
5 Were the DPPs somehow able to overcome that hurdle, however, certification would still not be
6 warranted, at least as the class is currently defined.

7 The named plaintiffs are three small companies and four individuals. All the named plaintiffs
8 purchased non-customized ODDs (or computers containing ODDs) from a defendant at non-
9 negotiable, list prices through a defendant's distribution subsidiary or retail website. In contrast, the
10 putative class encompasses a myriad of other ODD purchasers whose volumes and means of ODD
11 purchases do not compare. Dell and HP together accounted for almost half of defendants' dollar
12 value sales during the class period. Other OEMs and major distributors accounted for another
13 37.8%. Such purchasers typically negotiated prices. Dell and HP ran bidding processes, including
14 those that were the target of the bid-rigging at issue in the DOJ investigation.

15 The circumstances here are thus remarkably similar to those in *In re Graphics Processing*
16 *Units Antitrust Litigation*, 253 F.R.D. 478 (N.D. Cal. 2008) ("GPU").

17
18 Here, the representative plaintiffs' claims are not typical of the putative class.
19 Significantly, the named plaintiffs each purchased a single graphics card through [a
20 defendant's] websiteThe terms of their purchases were non-negotiable By
21 contrast, the putative class includes wholesale purchasers who collectively comprised
22 over 99.5% of defendants' business. These wholesale customers purchased a vast
23 array of products on individually negotiated terms. Unlike the representative
24 plaintiffs who had no negotiating power at all, some wholesale conglomerates, such
25 as Dell, Microsoft, Hewlett-Packard, Apple, Motorola, and Best Buy, likely had
26 more bargaining power than defendants themselvesThe wholesale purchasers
27 therefore came to the negotiating table in a fundamentally different position than the
28 representative plaintiffs.

253 F.R.D. at 489-90.

1 In light of the differences between the named plaintiffs and the larger entities in the putative
2 class, the *GPU* court refused to certify the class as defined.

3
4 These overwhelming disparities defeat typicality. The representative plaintiffs simply
5 do not have the appropriate incentive to establish antitrust violations with respect to
6 all of the absent class members. To prove their claims, the named plaintiffs will have
7 to show that the list prices that they paid for their graphics cards were artificially
8 inflated by defendants. Proof that defendants conspired to fix those prices would
9 hardly prove that defendants also conspired to fix the non-list prices for the
10 transactions entered into with absent wholesale purchasers.

11 *Id.*

12 The circumstances here are in a sense reversed, because even though the named plaintiffs
13 have strong evidence of bid-rigging involving some of the largest purchasers, they are struggling to
14 find a way to prove that list prices paid by ordinary purchasers such as themselves were fixed. The
15 disparity between the named plaintiffs and others in the class, however, is similarly acute.

16 Accordingly, even if the certification motion did not fall for failure to meet the requirements
17 of Rule 23(b) as described below, the disparity between the named class members would preclude
18 certification of the class as currently proposed. Whether the motion could be granted in part by
19 narrowing the class, as occurred in *GPU*, need not be considered at this juncture, given the
20 disposition.

21 2. Rule 23(b)

22 As noted, the DPPs seek certification under subsection (3) of Rule 23(b), which requires
23 them to show (1) “questions of law or fact common to the members of the class predominate” and
24 (2) “a class action is superior to other available methods for the fair and efficient adjudication of the
25 controversy.”

26 a. Predominance

27 Predominance requires “that the common issues be both numerically and qualitatively
28 substantial in relation to the issues peculiar to individual class members.” *In re Bulk [Extruded]*
Graphite Prod. Antitrust Litig., 2006 WL 891362 at *9. Generally speaking, the test for
predominance is met “when there exists generalized evidence which proves or disproves an [issue or
element] on a simultaneous, class-wide basis, since such proof obviates the need to examine each

class members' individual position." *In re Vitamins Antitrust Litig.*, 209 F.R.D. 251, 262 (D.C.Cir. 2002). In undertaking the predominance analysis, courts must identify the issues involved in the case and determine which are subject to "generalized proof," and which must be the subject of individualized proof. Here, the DPPs must satisfy the predominance requirement with respect to three key elements of their claims: (1) whether there was a conspiracy to fix prices in violation of the antitrust laws; (2) the fact of plaintiffs' antitrust injury, or "impact" of defendants' unlawful activity; and (3) the amount of damages sustained as a result of the antitrust violations. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2006 WL 1530166, *7 (N.D. Cal. 2006); *In re Vitamins Antitrust Litig.*, 209 F.R.D. at 257.

i. *Existence of Antitrust Conspiracy*

Common issues predominate in proving an antitrust violation "when the focus is on the defendants' conduct and not on the conduct of the individual class members." *In re Bulk [Extruded] Graphite Prod. Antitrust Litig.*, 2006 WL 891362 at *9; *see also, In re Flat Glass Antitrust Litig.*, 191 F.R.D. at 484. Not surprisingly, courts frequently find this standard satisfied in cases alleging price-fixing conspiracies. *See, e.g., In re Bulk [Extruded] Graphite Prod. Antitrust Litig.*, 2006 WL 891362 at *9 (whether a conspiracy exists is a common question that predominates over other issues in the case and "has the effect of satisfying the first prerequisite of FRCP 23(b)(3)").

Here, defendants argue at some length that the DPPs will be unable to show the existence of a conspiracy operating on a class-wide basis in the first instance. Those arguments, however, largely depend on defendants' efforts to recharacterize the claims, based on their own view as to what might be inferred from the evidence. Specifically, defendants insist that at best the DPPs will be able to prove limited "bid-rigging" as to which criminal convictions have already been obtained, and *perhaps* some other instances of "information sharing" that might or might not be unlawful.

The question is not whether the DPPs would prevail on the merits were they only to prove the limited wrongdoing defendants reluctantly concede might have transpired. The DPPs' theory is that there was a unitary, overarching, class-wide conspiracy, effectuated primarily through bid-rigging, inter-competitor agreements, and exchanges on price, output, and other types of confidential

information. Adequacy of proof aside, because the focus will be on defendants' conduct, the existence or non-existence of such a conspiracy could appropriately be adjudicated on a class-wide basis. *See In re Polypropylene Carpet Antitrust Litig.*, 178 F.R.D. 603, 623 (N.D. Ga. 1997) ("Defendants' attempts to arbitrarily redefine the anticompetitive behavior alleged by Plaintiffs is unsupported by any authority or the record in this case"); *accord In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 607 (N.D. Cal. 2010) ("*LCD I*") (rejecting attempts to recharacterize plaintiffs' allegations on a motion for class certification).⁵

That said, a troubling disconnect exists between the DPPs' articulated theory of an overarching conspiracy comprising innumerable acts of price-fixing carried out through various improper means and the expert opinion they offer in support of class certification. As discussed in more detail below, the expert analysis focuses on attempting to show a class-wide impact resulting from discrete instances of bid-rigging. If the DPPs intend to prove the broader form of conspiracy by showing the various wrongful acts and the participation of each defendant therein, then common issues would predominate, and they will either succeed or fail in persuading a trier of fact that such a conspiracy existed. If, as their proffered expert testimony suggests, they intend only to establish a narrower set of wrongful acts with industry-wide consequences, it is not clear that liability would attach to all or even most of the defendants—the conspiracy proved might differ greatly from that alleged, with different legal consequences. Put differently, defendants' recharacterization of the claims finds some support in the approach taken by the DPPs' expert.

Nevertheless, the mere proffer of the expert testimony does not preclude the DPPs from offering other evidence to establish the existence of the conspiracy they have alleged, and because the focus will be on defendants' conduct, class-wide adjudication of that question would be

⁵ This is not to say that mere allegations suffice at the class certification stage. "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." *Dukes*, 131 S. Ct. at 2551. While defendants insist that the DPPs' discovery responses reveal they lack evidence of any overarching conspiracy and actually are relying heavily on facts reflecting bid-rigging, the DPPs' theories are not so untethered from the record as to permit a determination at this juncture that they necessarily will fail. *See Amgen*, 133 S. Ct. at 1191 ("[T]he office of a Rule 23(b)(3) certification ruling is not to adjudicate the case . . .").

1 appropriate. Indeed, the existence or non-existence of a narrower conspiracy can be determined on a
2 class-wide basis, even if a finding of such conspiracy would not lead to the broad liabilities the
3 DPPs seek to impose. Accordingly, despite some questions as to how the DPPs intend to prove the
4 conspiracy they have alleged, its existence or non-existence is a question that both predominates and
5 is subject to common proof.

6
7 *ii. Antitrust Injury*

8 To proceed with a class action, the plaintiffs must be able to establish, predominantly with
9 generalized evidence, that all (or nearly all) members of the class suffered damage as a result of
10 defendants' alleged anti-competitive conduct. See *DRAM*, 2006 WL 1530166 at *7. This is where
11 the heart of the battle lies in the present motion. Defendants insist that the DPPs' proposed proof,
12 offered in the form of expert testimony from Dr. Gary French, is fatally flawed, and, indeed, subject
13 to their separately-briefed motion to strike.

14 Dr. French is an economist and a Principal Consultant to Nathan Associates, Inc. He holds a
15 doctorate in economics. Defendants do not challenge his credentials or expertise to offer expert
16 opinion in this matter. Dr. French offers three basic categories of opinions. First, he describes a
17 variety of conditions in the ODD industry that he contends were conducive to defendants "reaching,
18 monitoring and enforcing a cartel agreement as alleged." These include such things as the small
19 number of alleged cartel members, their "history of cooperation" in matters such as patent pools,
20 joint ventures, and "alliances," and other similar factors.

21 For purposes of this motion, there is no real dispute that the factors identified by Dr. French
22 as being "conductive" to anticompetitive activity existed in the industry. As defendants correctly
23 argue, however, while such industry characteristics may be preconditions for any colorable case of
24 class-wide impact, they do not establish such impact. See *GPU*, 253 F.R.D. at 502 ("Even if Dr.
25 Meyendorff's description of the industry is accurate, it does not suffice on its own as a method of
26 demonstrating impact to the specific direct purchasers at issue here through common proof.
27 Plaintiffs must show not that 'market conditions are favorable for impact' . . . but that there is a
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1 common, formulaic method of proving that if defendants conspired to raise prices, the direct
2 purchasers plaintiffs bought from paid an overcharge.”)

3 Dr. French next offers an opinion that the wrongful conduct alleged by the DPPs, “including
4 price fixing, bid rigging, allocation of customers, and exchange of commercially sensitive business
5 information” would have had class-wide impact as a result of so-called “most-favored-nation
6 clauses” in defendants’ contracts with Dell and HP. Defendants have shown there is significant
7 reason to doubt the “most-favored-nation” clauses had the results Dr. French contends they
8 produced. Among other things, the empirical data shows that prices charged to other customers did
9 not cluster within an especially narrow range above the supposed “floor” of the prices paid by Dell
10 and HP. In any event, Dr. French does not suggest his opinions about market conditions and the
11 most-favored nation clauses suffice to establish class-wide impact. Rather, he offers his third set of
12 opinions in the form of an empirical correlation analysis and a regression analysis as the heart of his
13 effort to show there are reliable, economically sound, methodologies to demonstrate that all, or
14 nearly all, members of the class suffered damage as a result of defendants’ alleged anti-competitive
15 conduct.

16 The standard under which expert opinion like that offered by Dr. French is to be evaluated at
17 class certification has been evolving. The *DRAM* decision suggested that courts “must avoid
18 engaging in a battle of expert testimony.” 2006 WL 1530166, at *9. Particularly in light of the
19 “rigorous analysis” required under *Dukes* and *Comcast*, however, the caution offered in *GPU* is apt.
20 “[C]ertification [should not be] automatic every time counsel dazzle the courtroom with graphs and
21 tables.” 253 F.R.D. at 491. If the presumption were otherwise, “nearly all antitrust plaintiffs could
22 survive certification without fully complying with Rule 23.” *Id.* at 492; *see also, In re High-Tech*
23 *Employee Antitrust Litig.*, 289 F.R.D. 555, 567 (N.D. Cal. 2013)(“conducting a thorough review of
24 Plaintiffs’ theory and methodology is consistent with the requirement that the Court conduct a
25 ‘rigorous analysis’” to ensure that the predominance requirement is met”); *In re Rail Freight Fuel*
26 *Surcharge Antitrust Litig.*, 725 F.3d 244, 255 (D.C. Cir. 2013) (“It is now clear . . . that Rule 23 not
27 only authorizes a hard look at the soundness of statistical models that purport to show
28

predominance—the rule commands it.”). Put another way, the inquiry must be to determine if the proffered expert testimony has the requisite integrity to demonstrate class-wide impact.

GPU notes that “antitrust plaintiffs have in recent years trended toward presenting an econometric formula or other statistical analysis to show class-wide impact” and that such analysis has often been accepted at the certification stage. 253 F.R.D. at 491. *GPU* concluded that “such methods, where plausibly reliable, should be allowed as a means of common proof. To rule otherwise would allow antitrust violators a free pass in many industries.” *Id.* Accordingly, it is clear that statistical and economic methodologies, including correlation analyses and regression analyses, *may* be employed to establish class-wide impact.

In this instance, however, the DPPs have not made a persuasive showing that Dr. French’s analyses are sufficient to carry their burden on this motion. First, Dr. French’s correlation analysis is offered to show that supra-competitive prices paid by Dell and HP as a result of bid-rigging *affected* prices paid by other purchasers. There appears to be little dispute, however, that strong correlations would arise from the long term price declines and the competitive market forces in any event. Indeed, Dr. French testified, “[w]ith or without a conspiracy I would expect to see high correlation of prices across customers in this industry.”⁶

Second, Dr. French’s regression analysis is, by his own characterization, designed to determine “how much lower prices would have been but for the alleged conspiracy.” To that end, Dr. French applies a model in which the alleged conspiratorial overcharge is assumed to be the same for all purchasers across all models of ODDs and throughout the entire class period. Whatever utility such an approach might have in calculating a damages total, it cannot serve to establish that all (or nearly all) members of the class suffered damage as a result of defendants’ alleged anti-competitive conduct. The regression analysis offered by Dr. French assumes the very proposition that the DPPs are now offering it, in part, to show.

⁶ It is of some note that Dr. French’s analysis also omits a step of “cointegration,” which the expert offered by the IPPs, Dr. Kenneth Flamm, asserts is necessary to derive valid correlation data. Because neither expert adequately demonstrates that the correlations have significance in light of the long term price decline, it is unnecessary to determine if the differences in their approaches undermine the reliability of either opinion.

Indeed, Dr. French asserts that each class member may calculate his or her damages merely by “applying the overcharge percentage estimated on a class-wide basis to [his or her] individual purchases.” While Dr. French calculates that the overcharge was about 11.48 percent in the aggregate, nothing in the regression methodology attempts to show that all or nearly all purchasers were overcharged in that amount, or in any amount at all.

Defendants attack numerous other aspects of Dr. French’s methodology and calculations. Most or all of those challenges fall into the category of issues that could be raised on cross-examination at trial, and that would go to the weight a trier of fact might assign to the opinions. Defendants also offer analysis by their own expert, Dr. Januz Ordover, purporting to show that if Dr. French’s regression model is modified to allow estimates of overcharges to be made for different customers, ODD types, and time periods, it establishes a *lack* of class-wide impact, and proves that many direct purchasers incurred no statistically significant overcharge. Whether Dr. Ordover’s modification to the models are analytically sound need not be decided at this juncture. Regardless of what those modifications do or do not show, Dr. French’s unmodified model makes no attempt to establish, but instead simply assumes, class-wide impact.

iii. *Damages*

In light of the DPPs’ failure to show that they have a viable method for establishing antitrust injury on a class-wide basis, not surprisingly it follows that they have failed to meet their burden to show damages. Two points nevertheless bear further mention. First, assuming the DPPs were able to establish a class-wide impact, and to prove that all or virtually all purchasers paid an overcharge of approximately 11.48 percent, then the proposed method of calculating damages might very well be adequate, at least as to purchasers of standalone ODDs.

Calculations need not be exact, see *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, (1931), but at the class-certification stage (as at trial), any model supporting a “plaintiff’s damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.”

Comcast, 133 S. Ct. at 1433.

The DPPs' proposal to multiply the overcharge percentage by each class member's purchases is consistent with their apparent theory that each plaintiff should be deemed to have incurred an overcharge in that approximate percentage. The need to calculate damages individually pursuant to such a formula does not preclude class certification. *See In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 582 (N.D. Cal. 2013).

Second, however, the method the DPPs propose for calculating damages as to ODDs installed in computers appears badly flawed, even assuming they could show all or virtually all purchasers incurred an overcharge of 11.48 percent or some other specific percentage.⁷ Because the DPPs would utilize a fixed average figure for the percentage of the system cost represented by an ODD, a purchaser of an expensive computer would be deemed to have suffered far more damage than a purchaser of a bargain computer, even where the ODDs installed in each were identical.⁸ While this issue likely could be addressed in some way and might not preclude class certification standing alone, it serves to highlight the challenges presented by the DPPs' desire to bring what remains a very broad conspiracy claim, involving disparate products and class members who may not all be identically-situated.

In summary, while the DPPs likely have made a sufficient showing that common issues predominate and at least theoretically could be subject to common proof as to the existence of an antitrust conspiracy and damages, their present approach of attempting to show a class-wide impact is problematic, and precludes granting certification. Whether the conspiracy is seen as an

⁷ The DPPs have shown, however, that they need not prove as a factual matter that the entire amount of any overcharge was passed on by defendants with respect to ODDs preinstalled in computers they sold. *See Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323, 327 (9th Cir. 1980); *In r Cathode Ray Tube (CRT) Antitrust Litig.*, 911 F. Supp. 2d 857, 871 (N.D. Cal. 2012) ("*Royal Printing* explicitly addressed the issue of apportioning damages and held that, in cases proceeding under the ownership and control exception, no apportionment is needed; plaintiffs are permitted to sue 'for the entire overcharge.'").

⁸ Plaintiffs propose deeming ODDs to constitute 3.5% of the sales price of computers. Thus, for example, the damages in the case of a computer selling for \$1000 would be \$4.02 ($\$1000 \times 3.5\% \times 11.48\%$) whereas the damages for a \$2500 computer would be \$10.05 ($\$2500 \times 3.5\% \times 11.48\%$), even if the ODDs in the two computers were identical, and were sold at the same time.

1 overarching one carried out through many wrongful acts, or one centered on the bid-rigging, with
2 alleged industry-wide consequences, the DPPs simply have not shown they possess a viable
3 methodology for proving with generalized evidence, that all, or nearly all members of the class
4 suffered damage as a result of defendants' alleged anti-competitive conduct.

5
6 b. Superiority

7 Rule 23(b)(3) also requires that a class action be superior to other methods of adjudication.
8 Some authority suggests that the superiority requirement is satisfied almost *a fortiori* if common
9 questions are found to predominate in an antitrust action. *See In re TFT-LCD (Flat Panel) Antitrust*
10 *Litig.*, 267 F.R.D. 583, 608 (N.D. Cal. 2010). In this instance, however, even if the DPPs had met
11 their burden to show a viable methodology for proving class-wide impact, substantial questions
12 would remain as to whether a class action would be the superior method of proceeding. Defendants
13 argue that the real parties in interest are a "handful" of OEMs who can bring their own actions, as
14 Dell has already done.

15 The issue, of course, overlaps and is intertwined with the typicality issues discussed above.
16 If the class were composed solely of individuals and small entities that purchased ODDs at retail list
17 prices, then the usual presumption of the superiority of a class action for such claims likely would
18 apply. *See In re Static Random Access (SRAM) Antitrust Litig.*, 2008 WL 4447592 (N.D. Cal. 2008)
19 ("In antitrust cases such as this, the damages of individual direct purchasers are likely to be too
20 small to justify litigation, but a class action would offer those with small claims the opportunity for
21 meaningful redress.") Even if the DPPs had satisfied the other requirements for class certification,
22 however, the superiority requirement of Rule 23(b)(3) would stand as an additional barrier to
23 certification of the class as presently proposed.

1 B. The Indirect Purchasers

2 The IPPs seek certification of a class of:

3 All persons and entities residing in the United States who indirectly purchased a new
4 ODD Product during the Class Period for their own use and not for resale that
5 contained an ODD manufactured by one or more Defendants or their conspirators.

6 The IPPs propose a slightly shorter class period than do the DPPs, extending through June of 2009
7 rather than the remainder of that year. Optimally, the IPPs seek a nationwide class under
8 California's Cartwright Act. Alternatively, they seek 24 separate state subclasses under that act, or
9 under the antitrust and/or consumer protection statutes of those states, depending on how the
10 relevant choice of law issues are ultimately resolved.

11
12 1. Rule 23(a)

13 The analysis of the IPPs' ability to satisfy the requirements of Rule 23(a) largely parallels
14 that set out above as to the DPPs. There is no question that numerosity (including ascertainability)
15 is present. As to commonality, while there again is an ultimately dispositive issue under Rule
16 23(b)(3) as to whether common questions predominate and can be answered through common proof,
17 the number and significance of such questions will be presumed sufficient for purposes of
18 subdivision (a).

19 The named indirect purchaser plaintiffs are in a stronger position than their direct purchaser
20 counterparts as to the requirements that their claims be typical of those of the class and that they can
21 serve as adequate representatives. While as noted, the named direct purchasers might be appropriate
22 representatives were the class narrowed, there is no similar divide among indirect purchasers
23 between large customers paying negotiated prices and individuals or small entities buying at retail.
24 All members of the putative indirect class are end-purchaser consumers. Accordingly, the IPPs have
25 adequately shown that the requirements of Rule 23(a) are satisfied.

1 2. Rule 23(b)

2 Again, the IPPs' challenges in satisfying Rule 23(b) have much in common with those of the
 3 DPPs. Were the only question whether they can establish the *existence* of a conspiracy through
 4 common proof, the fact that the focus would be on the conduct of defendants likely would suffice.
 5 *See In re Bulk [Extruded] Graphite Prod. Antitrust Litig.*, 2006 WL 891362 at *9 (whether a
 6 conspiracy exists is a common question that predominates over other issues in the case and "has the
 7 effect of satisfying the first prerequisite of FRCP 23(b)(3)"). As in the case of the DPPs, there is
 8 some tension between the IPPs' allegations and arguments of an overarching, multifaceted,
 9 conspiracy, and the approach of their expert in attempting to show class-wide impact from a more
 10 narrow set of alleged wrongs. Once more, however, that tension would not preclude certification
 11 were the existence of the conspiracy the only issue that needed to be proved on a class-wide basis.

12 The central issue for the IPPs, and where their showing falls short, is also whether antitrust
 13 *injury* (or "impact") and resulting damages can be shown on a class-wide basis, under a
 14 methodology of common proof. The IPPs offer the expert analyses of Dr. Kenneth Flamm, which is
 15 similar, but not identical to that of the DPPs' expert Dr. French. Dr. Flamm is a professor at the
 16 University of Texas who specializes in applied economics. His credentials and expertise to offer
 17 expert opinion in this matter are not challenged.

18 Like Dr. French, Dr. Flamm relies both on market characteristics and econometric modeling
 19 to support his opinions that there was class-wide⁹ impact and damages, subject to common proof.
 20 Again, showing the existence of industry characteristics that are conducive to class-wide impact
 21 may fulfill a requisite first step, but it does not establish such impact. *See GPU*, 253 F.R.D. at 502.
 22 Dr. Flamm's correlation analysis is, as alluded to above, somewhat more complex than that
 23 conducted by Dr. French. Rather than using simple averages of ODD prices, Dr. Flamm creates so-
 24 called hedonic indexes and Fisher indexes, by which he attempts to account for product differences

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 26

 27 ⁹ In this instance, "class-wide" refers first to the *direct* purchasers from whom the indirect class
 28 members purchases ultimately descend. Absent a showing that all or nearly all the original
 purchasers of the ODDs at issue paid supra-competitive prices, indirect purchasers would have no
 claim.

1 and other factors that are unrelated to the potential correlations he is seeking to uncover. Dr. Flamm
2 also performs a “cointegration analysis,” designed to eliminate any “spurious correlation”—a term
3 of art referring to variables that may track together, but without a causal relation between them.

4 Despite the additional complexity in Dr. Flamm’s approach, his results ultimately track the
5 opinion of Dr. French—that there was a relatively high correlation between prices across customers
6 and across different types of ODDs. As in the case of the DPPs, however, the IPPs have not made a
7 sufficient showing that such a correlation can serve as common proof of class-wide impact,
8 particularly in light of defendants’ evidence that such correlations would exist in any event in the
9 steadily declining prices that befell the ODD industry during the relevant period.

10 Dr. Flamm’s regression analysis similarly is more complex than that performed by Dr.
11 French, in that he utilizes more than one estimated overcharge coefficient. Dr. Flamm’s overcharge
12 coefficients, however, reflect aggregate estimates for all purchasers purchasing ODDs of particular
13 types in given years. As such, class-wide impact is still being *assumed* by the models, rather than
14 demonstrated by the results. Flamm also purports to test the validity of his models by looking to
15 specific examples in the data. As defendants point out, though, the selectivity of the pricing data
16 examined in the analysis substantially limits the conclusions that can be drawn. Identifying some
17 instances where the empirical data appears to match the model does not transform the analysis from
18 one that assumes class-wide impact into one that proves it.

19 Defendants have again offered numerous other criticisms of Flamm’s analysis, and present
20 their own adapted version of his methodology which they contend affirmatively establishes the
21 absence of a class-wide impact. Here, too, the soundness of defendants’ alternative analysis need
22 not be conclusively determined. Whether or not defendants’ analysis proves many class-members
23 were not injured, the threshold point is that the IPPs have not met their burden to show they have a
24 methodology capable of establishing impact and damages on a class-wide basis.

25 Moreover, as the IPPs recognize, their burden is two-fold. Not only must they show that all
26 or nearly all of the original *direct* purchasers of ODDs bought at inflated prices, they must also show
27 those overcharges were passed through all stages of the distribution chain. *See GPU*, 253 F.R.D. at
28 499. (“[I]ndirect-purchaser plaintiffs must demonstrate that defendants overcharged their direct

1 purchasers . . . and that those direct purchasers passed on the overcharges to plaintiffs. In so doing,
 2 they must find a way to account for the decision-making of a variety of resellers and
 3 manufacturers.”). Because the IPPs have failed to show a viable method for establishing impact to
 4 all or nearly all of the underlying direct purchasers, the class cannot be certified regardless of their
 5 showing on pass-through.

6 In the circumstances of this case, however, the indirect purchasers would face a significant
 7 hurdle in showing pass through on a class-wide basis. As in *GPU*, it would appear “that the only
 8 way to fully assess pass-through in this action would be to conduct a wholesaler-by-wholesaler and
 9 re-seller-by-re-seller investigation, which would essentially result in ‘thousands of mini-trials,
 10 rendering this case unmanageable and unsuitable for class action treatment.’” 253 F.R.D. at 505
 11 (quoting *McCarter v. Abbott Labs., Inc.*, 1993 WL 13011463, at *5 (Ala.Cir.Ct. 1993)). Among
 12 other things, the IPPs have not presented a persuasive explanation as to why it would be reasonable
 13 to assume a uniform pass through rate given that ODDs typically make up a relatively small portion
 14 of the cost of the products into which they are incorporated, and given the existence of price
 15 points—i.e., the common practice in the industry of selling products costing in the hundreds of
 16 dollars at prices just under the next \$100 mark. Thus, for example, if the overcharge paid by the
 17 direct purchaser on an ODD installed in a computer was only four dollars, it seems implausible that
 18 the retailer would then raise the price of a computer that otherwise would sell for \$999 to \$1003.
 19 Accordingly, even if the indirect purchasers could show that all or nearly all of the underlying direct
 20 purchases were made at prices artificially inflated by the alleged conspiracy, certification of an
 21 indirect purchaser class would not follow.¹⁰

22 ¹⁰ In light of the conclusions herein, there is no need to reach the choice of law issues that would
 23 determine whether indirect purchasers could pursue a nationwide class or otherwise apply California
 24 law outside the state. Likewise, there is no need to decide whether the Foreign Trade Antitrust
 25 Improvements Act, 15 U.S.C. § 6a (“FTAIA”) issue raised by defendants would preclude
 26 certification or could be decided on a class-wide basis, although there is reason to conclude it would
 27 not. See *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 583, 599 (N.D. Cal. 2010) (“The
 28 Court concludes that the FTAIA defense can be resolved on a class basis, and thus the possibility of
 this defense does not provide a basis for denying certification. Courts have emphasized that the
 FTAIA analysis focuses on the defendants’ conduct.”).

1 C. The motions to strike

2 As reflected in the preceding discussion, plaintiffs have not made a sufficient showing that
 3 the expert reports of Drs. French and Flamm provide an adequate basis for concluding that antitrust
 4 injury may be adjudicated on a class-wide basis. It does not follow, however, that either of those
 5 declarations should be stricken. When considering expert testimony offered pursuant to Rule 702,
 6 the trial court acts as a “gatekeeper” by “making a preliminary determination of whether the expert's
 7 testimony is reliable.” *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1063 (9th
 8 Cir.2002); see *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150, (1999); *Daubert v. Merrell Dow*
 9 *Pharms., Inc.*, 509 U.S. 579, (1993). Expert testimony is admissible if: (1) “the expert’s scientific,
 10 technical, or other specialized knowledge will help the trier of fact to understand the evidence or to
 11 determine a fact in issue;” (2) “the testimony is based on sufficient facts or data;” (3) “the testimony
 12 is the product of reliable principles and methods;” and (4) “the expert has reliably applied the
 13 principles and methods to the facts of the case.” Fed.R.Evid. 702. “Shaky but admissible evidence is
 14 to be attacked by cross examination, contrary evidence, and attention to the burden of proof, not
 15 exclusion.” *Primiano v. Cook*, 598 F.3d 558, 564 (9th Cir.2010) (citing *Daubert*, 509 U.S. at 594,
 16 596, 113 S.Ct. 2786).

17 Here, finding that plaintiffs fail to show the expert reports answer the critical questions is not
 18 equivalent to concluding the opinions are without reliable methods and principles, or are otherwise
 19 inadmissible. Accordingly, the motions to strike are denied.¹¹

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26 ¹¹ The sealing motions submitted in connection with class certification reflect that the parties have
 27 appropriately made the minimal redactions necessary to protect qualifying confidential information.
 28 The parties are requested to submit jointly a single proposed order specifying the materials that will
 remain sealed and identifying by docket number all of the sealing motions to which it pertains.

V. CONCLUSION

The motions to certify by both the DPPs and the IPPs, as well as defendants' motions to strike are denied. Within 20 days of the date of this order, the parties shall submit jointly a report as to their respective positions on how the litigation should proceed from this juncture.

IT IS SO ORDERED.

Dated: 10/3/14



RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE